



## Department of Energy

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

CORPORATE

February 5, 2003

In reply refer to: C-4

Ms. Erica Reichel  
113 – 17<sup>th</sup> Street NW  
Puyallup, WA 98371

Dear Ms. Reichel:

This letter is in response to your Freedom of Information Act request dated January 3, 2003, received by BPA's FOIA Officer on January 7, 2003 (FOIA #03-016.)

In your January 3 request you asked for (1) copies of any documents listing your name or identity specifically or by inference, (2) current or past "Fact Finder" reports requested by the Office of General Counsel, (3) Employee/Labor Relations documents, and (3) "Unofficial files" maintained by Robert Kiser, Terrie Jones, and/or Lorna Blue.

On January 17, 2003, you spoke with Marie Torrillo, Supervisory Human Resources Specialist, who is assisting the Authorizing Official, Roy Smithey, with the processing of your request. In response to this conversation, you sent an e-mail to Ms. Torrillo that clarified the scope of your request to include the following information: (1) current or past "Fact Finder" or investigative reports in which you are referred to by name or inference, (2) Employee/Labor Relations documents, and (3) unofficial notes, files or documents maintained by Robert Kiser, Terrie Jones, and/or Lorna Blue from 1994 to present, which refer to your conduct or performance, or which refer to any complaints you have made or complaints that have been made about you. During your discussion with Ms. Torrillo, you confirmed that you did not want a copy of your Official Personnel File (OPF) or any official BPA work products (e.g., cost/budget documents, budget history files, etc.)

Enclosed are those documents that BPA has determined may be released to you in whole or part. Other documents or portions thereof are being withheld for the reasons described in the following paragraphs. BPA has determined that this information should be withheld under exemptions available for attorney work-product, deliberative process, witness statement, and attorney-client privileges, pursuant to 5 USC § 552(b)(5) (Exemption 5) of the FOIA, and for personal privacy reasons, pursuant to 5 USC § 552(b)(6) (Exemption 6) of the FOIA. The specific documents or portions thereof that are being withheld are described in the attached Appendix A.

### Exemption 5

Exemption 5 protects inter-agency or intra-agency documents from disclosure that would normally qualify for a recognized civil discovery privilege. BPA asserts exemption 5 for portions of the fact-finding report that it located in response to your request. This report was prepared by a contractor who was hired to work as an agent for and under the direction of an attorney in BPA's Office of General Counsel; therefore, the report meets the requirement of being an inter- or intra-agency document. The withheld portions of the report qualify for one or more of the following privileges recognized under exemption 5: (1) the attorney work-product privilege, (2) the deliberative process privilege, and (3) the witness statement privilege.

BPA also asserts exemption 5 for various e-mails or portions thereof between BPA attorney David Filer and the following persons: (1) BPA managers Terrie Jones and/or Robin Furrer, (2) BPA Employee Relations Specialist, Dennis Saub, (3) BPA Labor Relations Specialist, Charles Ronsheimer, and (4) outside fact-finder, Hayward Reed (acting as an agent for BPA attorney, David Filer.) The withheld portions of these e-mails qualify for one or more the following privileges recognized under exemption 5: (1) the attorney work-product privilege, (2) the attorney-client privilege, and (3) the deliberative process privilege.

#### Attorney Work-Product Privilege

The attorney work-product privilege protects documents that were prepared by or under the direction of an attorney in contemplation of litigation. This includes the fact-finding report prepared by an outside investigator, Hayward Reed, who was engaged to investigate this matter by David Filer, an attorney within BPA's Office of General Counsel. Mr. Reed acted as Mr. Filer's agent in conducting the investigation. This also includes e-mails between Mr. Filer and Mr. Reed that discuss details of the fact-finding process. These e-mails include Mr. Filer's strategy as well as his thoughts and mental impressions.

The fact-finder report and associated e-mails were created in response to an allegation of harassment under BPA's Harassment-Free Workplace Policy; therefore, at the time the report was undertaken, BPA was investigating a claim that was likely to lead to litigation.

#### Attorney-client Privilege

BPA asserts the attorney-client privilege under Exemption 5 for e-mails that contain confidential communications between David Filer, attorney, and his clients. These documents were created by BPA employees and have not been released outside the Executive Branch of the Federal government. The documents concern information about labor relations and employee relations issues in which the client sought Mr. Filer's professional advice.

### Deliberative Process Privilege

The deliberative process privilege shields from disclosure documents which were created as part of an agency decision-making process. The report of investigation was created to assist BPA management in determining whether a claim of alleged harassment occurred which violated BPA's Anti-Harassment Policy. Many portions of the report reflect the personal views and recommendations of its author. For example, the report contains Mr. Reed's personal opinion of the credibility of witnesses and reliability of evidence. Release of this type of material could interfere with the candid exchange of written views in the future, thereby depriving the final decision-maker the benefit of being able to thoroughly evaluate this matter.

In addition to the fact-finder report itself, various e-mails between Mr. Filer and BPA staff are predecisional and deliberative. These e-mails contain discussions amongst internal staff on how to best deal with certain personnel and/or conduct issues. The e-mails do not contain any final decisions that were made by BPA, but reflect only the authors opinions and suggestions. Disclosure of this information could mislead the public by revealing information that may not have been the basis for management's decisions in these matters.

### Witness Statement Privilege

The privilege for witness statements is intended to prevent the threat of disclosure from affecting the candor of witnesses. The witness statement privilege protects the witness statements contained in the fact-finding report as well as those portions of the report that reveal the contents of the witness statements. To be effective, this investigation required that those persons interviewed give candid opinions of their co-workers and/or supervisors. Release of the statements would inhibit cooperation of witnesses in future investigations for fear that such statements would be made public.

### Exemption 6

BPA asserts Exemption 6 for information that reveals the identity of witnesses who participated in the fact-finding process. BPA also asserts Exemption 6 for the external e-mail address of the fact finder, Hayward Reed. Exemption 6 protects disclosure of personnel, medical and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy. Exemption 6 is intended to protect individuals from the injury and embarrassment that could result from unnecessary disclosure of personal information. In order to determine whether an agency record should be withheld under exemption 6 an agency must (1) identify whether a privacy interest exists, (2) identify whether release of the document would further the public interest by shedding light on the operations and activities of the Government, and (3) weigh the identified privacy interests against the public interest in order to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy.

First, we have determined that a privacy interest exists in this type of information. Witnesses have a significant privacy interest in their statements as well as a privacy interest in the portions of the fact-finder report that refer to their statements. There is a significant privacy interest in the identity of persons who participate in investigations concerning alleged harassment. The witness statements and other portions of the report contain candid comments and opinions of BPA employees and reveal detailed information about relationships between co-workers. Release of such information might lead to reprisals by or against these employees. In addition, there is a privacy interest in an individual's personal e-mail address. Release of an individual's personal e-mail address is a matter within the individual's own control. Release of such information could cause an unwarranted invasion of personal privacy by subjecting the individual to unwanted e-mail solicitations, etc.

Second, we have determined that the release of the witness statements would not further the public interest because it does not shed significant light on the operations and activities of the government. The statements concern certain internal management issues and working relationships between small groups of employees and do not contain the type of material that would significantly enhance the public's understanding of BPA's operations and activities. Similarly, the release of the fact finder's personal e-mail address would not enhance the public's understanding of BPA's operations and activities.

Finally, because there is a significant privacy interest in this information and there is little or no public interest that would be served by disclosure, we find that disclosure of this material would cause an unwarranted invasion of personal privacy.

If you are dissatisfied with this determination, you may appeal within 30 days from the date you received this letter to The Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. The appeal must be in writing and both the envelope and letter must be clearly marked "Freedom of Information Act Appeal."

You will receive an invoice under separate cover for the costs associated with processing your request.

Sincerely,

A handwritten signature in cursive script that reads "Annie Eissler FOR". The signature is written in dark ink and is positioned above the typed name and title.

Annie Eissler  
Freedom of Information Act Officer

Enclosures:

- (1) Non-exempt documents
- (2) Appendix A

## APPENDIX A

Description	Applicable FOIA Exemptions	Withheld in entirety or partially redacted
Fact Finder Report prepared by Hayward Reed, dated November 2000, (includes investigator's report and witness statements)	5 (attorney work-product, deliberative process and witness statement) & 6	Withheld all but requester's own statement and portions of report/statements relied on to support disciplinary action.
E-mails between David Filer and Hayward Reed, dated November 2000 (discussing investigation strategy)	5 (attorney work-product) & 6	Redacted Mr. Reed's personal e-mail address. Non-exempt portions of e-mails enclosed in whole or part, if applicable; remainder of e-mails withheld in entirety - - No reasonably segregable portions.
E-mails between David Filer and one or more of the following internal BPA employees: (1) Dennis Saub, (2) Robert Kiser, (3) Terrie Jones, (4) Charles (Ron) Ronsheimer, (5) Dave Hart, (6) Robin Furrer; dated January 2001 through April 2001 (predecisional and deliberative discussions concerning labor relations and employee relations issues subsequent to harassment investigation)	5 (deliberative process, attorney-client)	Non-exempt portions of e-mails enclosed in whole or part, if applicable; remainder of e-mails withheld in entirety - - No reasonably segregable portions.